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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-393

UNITED TRANSPORTATION UNION, PETITIONER

v.

UNITED STATES OF AMERICA AND
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (Pet. App. A) is reported at 464 F.2d 301. The opinion of the original panel, reproduced as Appendix A to this brief, *infra*, pp. 12-19, is not officially reported. The opinion of the district court (Pet. App. B) is reported at 52 F.R.D. 276.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* (App. B, *infra*, p. 20) was entered on June 13, 1972. The petition for a writ of certiorari was filed on September 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Railway Labor Act does not exempt the St. Louis-San Francisco Railway Company and the United Transportation Union from their obligation under Title VII of the Civil Rights Act of 1964 to eliminate the present, continuing effects of past racial discrimination against blacks hired as train porters by the company.

2. Whether the court of appeals correctly held (a) that a craft seniority system which perpetuates the effects of past discrimination against blacks hired as train porters is not a *bona fide* seniority system within the meaning of Section 703(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(h)); and (b) that ordering modification of this discriminatory seniority system to permit blacks hired as train porters to retain in other, previously all-white jobs some of the seniority earned in their all-black train porter jobs does not accord preferential treatment to the blacks in conflict with Section 703(j) of the Act (42 U.S.C. 2000e-2(j)).

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, and the Railway Labor Act, 45 U.S.C. 152 First, are set forth at pages 2-4 of the petition.

STATEMENT

This suit was filed by the United States under Section 707 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6, alleging that the defendants, the St. Louis-

San Francisco Railway Company (Frisco) and the Brotherhood of Railroad Trainmen (BRT) were engaged in a policy and practice of discrimination in employment against blacks hired as train porters by Frisco. Before trial, the petitioner United Transportation Union (UTU) succeeded to and assumed the rights and obligations of the BRT (Pet. App. B, p. A29, n. 2).

The uncontradicted evidence showed that pursuant to a collective bargaining agreement between Frisco and the BRT in effect from 1928 until 1949, blacks employed in the operating department of the railroad were excluded from the job of brakeman and were hired only as train porters (Pet. App. A, pp. A3-A4). It was also undisputed that even after the formal, written ban on hiring blacks as brakemen was removed in 1949, only one black was hired as a brakeman from that year until 1966, while some 750 whites were hired as beginning brakemen during the same period (Pet. App. A, pp. A3-A4, A8-A9). The job of train porter had been filled solely by blacks; and it had always carried a lower rate of pay than the traditionally white job of brakeman, except for a brief period during and shortly after World War I when the pay of the two jobs was equalized while the railroad was under federal control (Pet. App. A, p. A3).

Black train porters were assigned to work exclusively on passenger trains, where they performed head-end braking duties and also assisted passengers, handled baggage, and kept the coaches clean. White brakemen did the braking work on the back end of the

passenger trains and on both ends of freight trains (Pet. App. A, p. A4). When Frisco discontinued passenger trains in 1967, the white brakemen on these trains were able to use their accumulated seniority to move to braking jobs in freight service. However, the craft seniority system prevented the black train porters from exercising any of their seniority to obtain freight braking jobs. Even though Frisco offered several of the train porters jobs as brakemen in freight service, they were required to go to the bottom of the seniority roster and thus to start over like new employees (Pet. App. A, pp. A7, A9-A10).

Notwithstanding this factual showing, the district court dismissed the government's action and entered judgment for the defendants (Pet. App. B). On appeal, a divided panel of the court of appeals affirmed (App. A, *infra*, pp. 12-19). On rehearing *en banc*, the court of appeals reversed and remanded, holding: (1) that the evidence clearly demonstrated overt racial discrimination by Frisco and BRT in hiring blacks only for the job of train porter and excluding them from the job of brakeman; (2) that the effects of the past discrimination were presently perpetuated by Frisco's refusal to allow the train porters to exercise any of their seniority in the job of brakeman; and (3) that Frisco had failed to show that this discriminatory seniority system is justified by business necessity (Pet. App. A, pp. A8-A13).

The court of appeals set forth guidelines to be followed by the district court in fashioning an appropriate remedy for the Title VII violation. These include the following: (a) Frisco must offer to employ

all former train porters as brakemen within six months from the date the district court's order becomes final. (b) Frisco must create and implement a program to train the former porters to perform all the braking functions they will be required to perform as brakemen. During the training period the porters must be paid the salary of beginning brakemen. (c) Each porter who completes the training program and is found qualified to become a brakeman must be given seniority credit equal to 100 percent of the time spent in the training program, plus 50 percent of his accumulated seniority as a train porter. Porters who have already moved to brakeman jobs must be given seniority credit equal to 100 percent of the time they have spent as brakemen, plus 50 percent of their train porter seniority. (d) No back pay is to be awarded. (Pet. App. A, pp. A15-A18).

Three judges dissented, and two of the judges who otherwise concurred in the decision dissented from the denial of back pay (Pet. App. A, pp. A20-A26).

ARGUMENT

The holding of the court of appeals—that a seniority system which denies blacks an opportunity to enter on an equal basis higher paying, traditionally white jobs from which they were formerly excluded because of their race perpetuates the effects of past discrimination in violation of Title VII—follows all of the earlier decisions on this question,[1] and is in accord with the

[1] *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (C.A. 5), certiorari denied, 406 U.S. 906; *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (C.A. 2); *Robinson* v. *Lorillard Corp.*,

principles of *Griggs* v. *Duke Power Co.*, 401 U.S. 424. In *Griggs* this Court held that Title VII prohibits not only overt discrimination, but also employment practices which are neutral on their face and even in their motive but which have an unwarranted, disproportionate adverse impact on blacks or other minorities.

As we show below, there is no merit in petitioner's suggestion that in enacting Title VII Congress intended to exclude the railroad industry or to permit it to operate under a different rule of law than other industries. Nor is there justification for treating craft and class seniority systems differently from other seniority systems. (See pp. 9-10, *infra*.)

It is equally clear that a seniority system which continues the effects of past discrimination is not a *bona fide* seniority system protected by Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), and that requiring modification of such a seniority system to permit black employees previously excluded from white jobs to exercise the seniority they accrued in their black jobs when they now qualify to fill a formerly white job does not give the black employees a preference prohib-

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444 F.2d 791 (C.A. 4); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (C.A. 4), reversed on another issue, 401 U.S. 424; *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7) (sex discrimination).

Closely analogous decisions have held that union referral systems which perpetuate past discrimination violate Title VII. *United States* v. *Sheet Metal Workers, Local 55*, 416 F.2d 123 (C.A. 8); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *United States* v. *Electrical Workers, Local 38*, 428 F.2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (C.A. 9), certiorari denied, 404 U.S. 984.

ited by Section 703(j) of Title VII, 42 U.S.C. 2000e-2(j) (see pp. 10-11, *infra*).

Accordingly, while we believe that, on the facts of this case, the court of appeals should have directed complete relief for the affected class of train porters —*i.e.*, full rather than 50 percent seniority carryover and full back pay[2]—we do not think the issues raised by petitioner warrant review by this Court.

1. Petitioner contends first that even though the seniority system embodied in its collective bargaining agreement with Frisco prevents members of the affected class of train porters from using any of their accrued seniority to obtain and hold vacancies in the job of brakeman, that seniority system cannot be held violative of Title VII because it was executed and is being carried out pursuant to the Railway Labor Act, Section 2 First of which makes it the duty of carriers and employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" (Pet. 8-9).

This argument does not withstand analysis. First, the Railway Labor Act neither expressly nor impliedly sanctions agreements which have a racially discriminatory impact, nor does it in any way prohibit railroads and unions from modifying their agreements to remove the discriminatory features.[3] Second, Congress

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[2] The United States is filing a separate petition for a writ of certiorari seeking review of the denial by the court below of full seniority carryover and back pay relief.

[3] Indeed, long before the adoption of the Civil Rights Act of 1964, the Railway Labor Act was held to bar racially discrimina-

has clearly provided that employers and unions covered by the Railway Labor Act, as well as those covered by the National Labor Relations Act, are subject to the provisions of Title VII. Section 701(e), 42 U.S.C. 2000e(e), in defining labor organizations subject to Title VII, specifically refers to those certified under the Railway Labor Act; and railroads are employers within the meaning of Section 701(b), 42 U.S.C. 2000e(b). *Norman* v. *Missouri Pacific Railroad*, 414 F.2d 73, 79 (C.A. 8); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 455 (C.A. 5), certiorari denied, 406 U.S. 906. Third, the discriminatory features of agreements similar to the one in-

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tory conduct by unions in representing employees. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192.

Chicago & North Western Railway Co. v. *United Transportation Union*, 402 U.S. 570, cited by petitioner (Pet. 9), does not support the proposition that agreements made and maintained under the Railway Labor Act are immune from the requirements of Title VII. That case involved a suit by a railroad to enjoin a strike threatened by the union over a dispute as to the number of brakemen to be employed on each train. The railroad alleged that the union had not complied with Section 2 First of the Railway Labor Act. The district court concluded that the question whether either party had violated Section 2 First was one solely for determination by the National Mediation Board, and that the Norris-La Guardia Act deprived the court of jurisdiction to issue an injunction against the threatened strike. The court of appeals affirmed. This Court reversed, holding that Section 2 First was a legal obligation on carriers and unions enforceable in the courts, and that the Norris-La Guardia Act did not prevent the issuance of a strike injunction when such a remedy was the only practical, effective means of enforcing Section 2 First. Nothing in this Court's opinion indicates that railroads and unions are free to make and maintain racially discriminatory agreements, or that parties to such an agreement have no alternative but to continue enforcing it.

volved here were held to violate Title VII in the one other appellate decision involving the railroad industry where the issue has been specifically adjudicated. *United States* v. *Jacksonville Terminal Co., supra*, 451 F.2d at 453.*

While courts have authority under the Railway Labor Act to protect employees against invidious discrimination (see, *e.g.*, the cases cited at Pet. 9, n. 3), as they do also under the National Labor Relations Act (see, *e.g.*, *Syres* v. *Oil Workers International Union, Local No. 23*, 350 U.S. 892; *Local 12, United Rubber Workers* v. *National Labor Relations Board*, 368 F.2d 12 (C.A. 5), certiorari denied, 389 U.S. 837), it has uniformly been held that in enacting Title VII Congress expanded the scope of judicial inquiry and broadened the remedies available in cases involving racial discrimination in employment. *Norman* v. *Missouri Pacific Railroad, supra; United States* v. *Jacksonville Terminal Co., supra*, 451 F.2d at 454-455; *Taylor* v. *Armco Steel Corp.*, 429 F.2d 498 (C.A. 5).

2. Petitioner also argues that the relief directed by the court of appeals, which permits members of the

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* Agreements which perpetuate the effects of racial discrimination have been held to be unlawful under Title VII in several other industries. *E.g., United States* v. *Bethlehem Steel Corp., supra* (steelmaking plant); *Griggs* v. *Duke Power Co., supra* (electric power plant); *United States* v. *Virginia Electric and Power Co.*, 327 F.Supp. 1034 (E.D. Va.) (electric power company); *United States* v. *Central Motor Lines, Inc.*, 338 F.Supp. 532 (W.D.N.C.) (interstate motor carrier); *Local 189, United Papermakers* v. *United States, supra* (paper mill); *Robinson* v. *Lorillard Corp., supra* (tobacco plant); *Clark* v. *American Marine Corp.*, 304 F. Supp. 603 (E.D. La.) (marine company); *Irvin* v. *Mohawk Rubber Co.*, 308 F. Supp. 152 (E.D. Ark.) (rubber plant).

affected class of blacks to exercise 50 percent of their train porter seniority after they qualify to fill openings in brakeman jobs, (a) nullifies a *bona fide* seniority system which is protected by Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), and (b) grants preferential treatment to members of the affected class which is prohibited by Section 703(j) of Title VII, 42 U.S.C. 2000e-2(j) (Pet. 11-14).

It is well established, however, that a seniority system which continues the effects of past discrimination, by depriving employees of the use of their accrued seniority in jobs formerly denied them because of their race, is not a *bona fide* seniority system within the meaning of Section 703(h) of Title VII. *Local 189, United Papermakers* v. *United States, supra*, 416 F.2d at 988; *United States* v. *Jacksonville Terminal Co., supra*, 451 F.2d at 453; *Robinson* v. *Lorillard Corp., supra*, 444 F.2d 791, affirming 319 F. Supp. 835, 843 (M.D.N.C.); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 517 (E.D. Va.). See also *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 658-659.[8]

Similarly, the courts have consistently held that to permit black employees, after they qualify for previously all-white jobs, to exercise seniority they earned in previously all-black jobs grants no unlawful preference to the black employees. It simply enables them

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[8] Contrary to petitioner's contention (Pet. 13), the legislative history of Title VII offers no support for the view that Congress intended to allow employers or unions to adhere to seniority systems which perpetuate the effects of past discrimination. See *Quarles* v. *Philip Morris, Inc., supra*, 279 F. Supp. at 516-517; *Local 189, United Papermakers* v. *United States, supra*, 416 F.2d at 987-988; *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 661.

to compete on a more equitable basis with their white contemporaries for the employment advantages—*e.g.*, job security, opportunity for promotion, and fringe benefits—which are normally tied to seniority. *Local 189, United Papermakers* v. *United States, supra*, 416 F.2d at 995; *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 661-662; *Robinson* v. *Lorillard Corp., supra*, 444 F.2d at 800; *Quarles* v. *Philip Morris, Inc., supra*, 279 F. Supp. at 516; *Clark* v. *American Marine Corp., supra*, 304 F. Supp. at 609.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1247

United States of America,
Appellant,

vs.

St. Louis-San Francisco Railway Company and United Transportation Union, Successor to Brotherhood of Railroad Trainmen,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

February 22, 1972.

Before VAN OOSTERHOUT, Senior Circuit Judge, Ross and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The United States appeals from an order dismissing its action in the district court and giving judgment to appellees (Frisco). The Government charged Frisco with having engaged in a policy and practice of discrimination on account of race against its negro train

porters, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), and sought to have these employees reclassified as freight brakemen, carrying with them their accumulated seniority as train porters. Jurisdiction is founded on § 2000e-5(f) of the Act. See *Norman* v. *Missouri Pacific Railroad*, 414 F.2d 73 (CA8 1969). We affirm on the basis of Judge Harper's well-considered opinion which is reported at 52 F.R.D. 276 (E.D. Mo. 1971). We are satisfied that the trial court's findings of fact are supported by substantial evidence and that the law has been correctly applied.

Neither the anti-preference section (§ 2000e-2(j)) nor the provision safeguarding seniority systems (§ 2000e-2(h)) operate to prevent courts from eliminating present discriminatory effects of past discrimination which is preserved through the use of neutral employment policies. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (CA2 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (CA8 1970); *United States* v. *Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123 (CA8 1969) and *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States* 416 F.2d 980 (CA5 1969). See Note, Title VII, Seniority Discrimination And The Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). It is equally clear, however, that courts, with their broad authority to fashion remedies under the Act, should not emasculate valid seniority systems so long as they are conceived out of *business necessity* and not out of racial discrimination. *Local 189, supra*, at 989, 993-

994; *Whitfield* v. *United Steelworkers of America, Local 2708,* 263 F.2d 546 (CA5 1959) and *United States* v. *H. K. Porter Co.,* 296 F.Supp. 40, 66-68 (N.D. Ala. 1968). See Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); Kovarsky, Current Remedies for the Discriminatory Effects of Seniority Agreements, 24 Vand. L. Rev. 683 (1971) and Yeager, The "Unqualified" Minority Worker, 59 Geo. L. J. 1265 (1971). *Cf. Griggs, supra.*

A careful review of the record convinces us the findings of the district court preclude reclassification of the train porters as freight brakemen with carry-over seniority. Not only is there a functional difference between the crafts of train porters and brakemen, but Frisco's seniority system is based on a recognition that a brakeman's job is complex and hazardous, requiring related experience in safety and repair work at the various levels of job progression. Reclassification with carry-over seniority, under these circumstances, could occur only at the expense of safety and efficiency.[1]

Litigation involving the train porters and their economic status has been before this Court almost continuously since 1946.[2] A review of this litigation discloses that although these blacks and their predecessors were originally locked into the train porter craft by joint Frisco-Union discriminatory practices, their plight in the last two decades has been predomi-

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[1] See *United States* v. *Jacksonville Terminal Co.,* 451 F.2d 443-448 (CA5 1971).

[2] See *United States* v. *St. Louis-San Francisco Railway Co.,* 52 F.R.D. 276 (E.D. Mo. 1971) (cases cited at 277-278).

nantly economic in origin. The advent of the diesel engine, the dramatic decline of the railroad industry and the elimination of passenger service in 1967 all have combined to wreck havoc upon train porters, rendering them virtually an extinct occupational species. Under these circumstances, we believe the remedy sought would be clearly improvident.[3]

Affirmed.

Ross, Circuit Judge (dissenting)

I respectfully dissent. I agree with the majority and with Judge Harper that there are some functional differences between the duties of the crafts of train porter and brakeman; that a brakeman's job is complex and hazardous, requiring related experience in safety and repair work; and that a complete merger of the seniority lists of the two crafts could occur only at the expense of safety and efficiency. I do not agree, however, that a complete merger of the two lists was the *only* possible remedy and believe the case should be remanded with directions to the trial court to fashion an appropriate remedy as permitted by Title VII.

Past discrimination is evident from the fact that from 1928 until 1949 an agreement existed between

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[3] We do note that Frisco prior to the trial herein had already offered the train porters positions in other crafts including that of brakeman but without carry-over seniority.

The only remedy requested herein was complete merger of the brakemen and train porter crafts with carry-over seniority. Upon inquiry by the court during the oral argument as to whether there was a middle ground that could be applied in fashioning a remedy, counsel for the Government declined to suggest any.

Frisco and the Brotherhood of Railroad Trainmen which provided that "in the future hiring of employees in train, engine, and yard service but not including Train Porters, only white men shall be employed." And from the statistics received from Frisco in answer to an interrogatory, it is apparent that, with one possible exception, no black was hired as a brakeman between 1928 and 1966. On oral argument, counsel for the Union conceded that there was past discrimination, but claimed that there was no discrimination in the present employment practices. When the position of train porter was discontinued in 1967, Frisco offered the porters positions as brakemen but without any carry-over seniority.

The effect of discrimination of the past, however, carried over under the craft seniority system after the use of train porters was discontinued. "Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). Thus where an employer's current policy serves to perpetuate the effects of past discrimination, "although neutral on its face, it rejuvenates the past discrimination in both fact and law regardless of the present good faith." *Marquez* v. *Omaha District Sales Office, Ford Division,* 440 F.2d 1157, 1160 (8th Cir. 1971).

Admittedly, much of the plight of train porters has been precipitated by the declining economic conditions

of the railroad industry, but the results are the same as if they were caused solely by racial discrimination. *See United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 445 (5th Cir. 1971). Because that result, even though in a current neutral environment, is tainted with the effects of past discrimination, it is remediable.

A neutral policy, which is inherently discriminatory, may, of course, be valid if it has business justification. *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). However, this doctrine of business necessity, which has arisen as an exception to the amenability of discriminatory practices, connotes an irresistible demand. The system in question must not only foster safety and efficiency, but must be essential to that goal. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971). In other words, there must be no acceptable alternative that will accomplish that goal "equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *accord, United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 662. I am confident the district court in this case is capable of fashioning a remedy that would not frustrate this basic goal, by making sure that train porters would not be promoted into brakeman functions they are unqualified to perform. Therefore, in my opinion, an acceptable alternative does exist.

Regardless of what was considered the train porters' primary function, the crucial factor is that they served as train porters, rather than brakemen, because of

past discriminatory practices. It is indisputable that train porters were qualified for and did perform many braking functions, and a remedy could be fashioned wherein both abilities and disabilities of the train porters would be taken into account.

The district court has wide discretion in fashioning decrees to insure compliance with Title VII. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 428 (8th Cir. 1970). *See e.g.* this Court's recent en banc decision in *Carter* v. *Gallagher*, No. 71-1181 (8th Cir. Jan. 7, 1972). The court could "carefully tailor" a remedy that would accord the displaced train porters their "rightful place,"[1] taking into consideration their past braking experience and their ability to perform braking functions, and yet accord management supervision over the qualifications of personnel bidding for vacancies. I, therefore, would reverse and remand this case to the district court in order that a

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[1] *See e.g., United States* v. *Jacksonville Terminal Co., supra*, 451 F.2d at 452-453; *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 661; *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 800 (4th Cir. 1971), *petition for cert filed*, 40 U.S.L.W. 3251 (U.S. Sep. 24, 1971) (No. 71-427); *Griggs* v. *Duke Power Co.*, 420 F.2d 1225, 1236-1237 (4th Cir. 1970), *rev'd on other ground*, 401 U.S. 424 (1971); *Local 189, United Papermakers and Paperworkers* v. *United States, supra*, 416 F.2d at 988; *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 520 (E.D. Va. 1968); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1163-1164 (1971); Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1632-1636 (1969); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268-1269 (1967).

remedy can be fashioned in accordance with the basic principles expressed herein.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1247

United States of America, by Attorney General, John N. Mitchell, *Appellant*, v. St. Louis-San Francisco Railway Company, et al., *Appellees.*	September Term, 1971 Appeal from the United States District Court for the Eastern District of Missouri.

This cause came to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for further proceedings consistent with the majority opinion of this Court this day filed herein.

JUNE 13, 1972

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